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United States Circuit Court of Appeals

for the Ninth Circuit

JOHN B. SWITZLER,
Plaintiff and Respondent,

vs.

F. E. EARNHART,
Defendant and Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States Circuit Court for the District of Oregon.

DOUGLAS W. BAILEY,
Solicitor for Defendant and Appellant.

FILED

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STATEMENT OF THE CASE.

The plaintiff charges substantially in his Bill of Complaint that he is a citizen of the United States, having the qualifications to enter land under the homestead laws of the United States, and that he acquired possession of the tract of land in controversy in the year 1893, and that he improved same and intended to enter same under the general land laws of the United States as soon as same should be surveyed, it being unsurveyed land, and that he continued to occupy and improve same until about 1903, when he leased to one John E. Hatter, and that before expiration of the lease said Hatter conspired with defendant Earnhart to turn the lands and the possession of same over to defendant Earnhart, who went into possession and now refuses to remove from the premises, etc., and as relief, asks for an injunction enforcing defendant to remove from the lands and cease to interfere with same.

Defendant appeared and demurred to the bill on the ground that the court had no jurisdiction.

The demurrer was overruled and defendant answered, but failed to serve copy of answer on plaintiff. Plaintiff then moved that the answer be stricken and for a decree pro confesso, because no answer was served. The motion was sustained, defendant filed an affidavit and moved that the order striking the answer be revoked and that the answer be allowed. The affidavit set forth that soon as defendant's attention was called to the fact that no copy had been served that a copy was then served and furnished to the plaintiff, such copy being served before the motion to strike was heard or allowed.

The court overruled the defendant's motion and entered a decree against the defendant for the relief prayed for.

It is from the final decree and from the judgment overruling defendant's demurrer defendant appeals.

The plaintiff and defendant are each citizens of the State of Oregon, the land in controversy is situated in Oregon.

POINTS AND AUTHORITIES.

There being no diverse citizenship the plaintiff must by his Bill of Complaint to sustain jurisdiction present a question arrising under the constitution, laws or treaties of the United States. Measured by judicial decision, the Bill of Complaint does not present a federal question.

Butler vs. Shafer, 67 Fed. 161.

Gold Washing & Water Co. vs. Keys, 96 U. S. 199.

Blackburn vs. Portland Gold Mining Co., 175 U. S. 574.

Florida Central P. R. R. Co. vs. Bell, 176 U. S. 321.

To sustain jurisdiction the Bill of Complaint must in itself present a Federal question, etc.

Metcalf vs. Watertown, 128 U. S. 586.

New Jersey R. R., etc., vs. Mills, 113 U. S. 249.

Tennessee vs. Union and Planters Bank, 152 U. S. 454.

ARGUMENT.

Upon the question of jurisdiction we deem it unnecessary to offer any argument. The question has been so often decided and so thoroughly discussed that it would seem useless to do so. The case of Buttler vs. Shaeffer supra, is so nearly like the case at bar that there would seem to be no doubt about the question.

Upon the question of striking the answer, it seems that under the circumstances and in the exercise of a sound discretion the court should have permitted the answer.

It presented a meritorious defensese. No injury or inconvenience resulted to plaintiff from the fact of not being furnished a copy and it would indeed be a serious and too harsh a penalty for the defendant to be deprived of his right to be heard concerning his right to property of the value of more than $2000, simply because counsel failed to supply the plaintiff with a copy of the answer after it had been filed. We doubt if in the whole history of

American jurisprudence a parallel case can be found of record where such extreme penalty was imposed.

Rules of practice should be liberally construed in furtherance of proper administration of justice.

Streeter Fed. Eq., Sec. 129.

The inflexible enforcement of rules of practice which would result in the dismissal of a suit on purely technical grounds is abhorrent to the principles of equity.

Streeter Fed. Eq. practice Sec. 129.

Barrett vs. Twin City Power Co., 111 Fed. 45.

The decree of the lower court should be reversed and the bill of complaint dismissed.

Respectfully submitted,

DOUGLAS W. BAILEY,

Solicitor for Defendant and Appellant.